No. 21272

United States
COURT OF APPEALS
for the Ninth Circuit

VELJKO STANISIC,

Petitioner,

v.

UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE and ALFRED J. URBANO, District Director, United States Immigration and Naturalization Service,

Respondents.

PETITIONER'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

FILED
FEB 8 1967
WM. B. LUCK, CLERK

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FEB 15 1967

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SUMMARY OF ARGUMENT

The Government's statement of the statutory scheme applies to crewmen with a wanderlust who jump ship, but not to a crewman seeking asylum to escape persecution. To apply a summary proceeding under 8 U.S.C. 1282 (b) to the latter is a denial of due process.

All hearings and proceedings heretofore have been under the old statute (8 U.S.C. 1253 (h)) dealing with "physical persecution," and the Government ignores the shift in goal posts to a much more liberal framework, and a new set of rights based thereon.

An examination of the record shows that the hearing before the District Director, besides being limited to "physical persecution" under the old statute, was marked with bias and prejudice not in keeping with due process.

Therefore, this Petitioner should have his "day in court" before an impartial special inquiry officer to present his evidence under the statute as amended.

1. Statutory Scheme

The Government's narrative of the deliberations of the Congressional Committees is relevant to the thousands of seamen who jump ship to get better jobs or otherwise find "greener pastures," but it is irrelevant to the case of the crewman trying to escape persecution. Very few indeed can claim that they are the objects of persecution. Stanisic is one of these. Human rights to life and freedom from persecution[1] are paramount to the need to keep alien seamen and ships moving. The claim of asylum places this case in a spe-

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[1] Cf. Mississippi et al v. Meredith, etc., 372 U.S. 916, 83 S. Ct. 722, 9 L. Ed. 2d 723 (1963) pursuant to which the Federal Government even put a regiment at "Ole Miss" to assure one Negro student the right to an education at the college of his choice.

cial category and does not fit the general rule. Most civilized countries accord asylum to a refugee from persecution, regardless of how he arrives. Such a refugee has little choice, and the usual machinery of passports, visas and quotas is not open to him. To the extent that the Government's interpretation denies a sanctuary to Stanisic it is stating bad law. It runs contrary to the mid-century trend in the United States.

The refugee has no choice; it is his life and sanity —or else escape to some asylum. The summary proceedings which the District Director has invoked here cannot be expanded to fit under our system of due process a person seeking asylum.

The Supreme Court, since the writing of Petitioner's Opening Brief, has stated in *Immigration Service* v. *Errico*, — U.S. —, 87 S. Ct. —, 17 L. Ed. 2d 318 (1966), a case even involving fraud, the following rule:

> "Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien. As this Court has held, even where a punitive section is being construed:
>
> " 'We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. . . . It is the forfeiture of misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less

> generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used. . . .' "

The statutory scheme must never lose sight of the humanitarian goal, regardless of how the alien came to these shores. This is woven into the Constitution.

It is disturbing to note that the case of *Savelis* v. *Vlachos*, 137 F. Supp. 389, affirmed 248 F.2d 729 (C.A. 4, 1957) which the Government uses (Br. 14) to sustain the constitutionality of Section 252 (b) of the Immigration and Nationality Act, 8 U.S.C. 1282 (b), does not involve any alien crewman seeking sanctuary from persecution, but only three seamen showing a need for hospitalization and seeking a change from a D-1 to a D-2 permit. As applied to the Petitioner who is seeking to escape persecution in Yugoslavia the summary and swift proceedings under Section 252 (b) have not here, and cannot in the very nature of the proceedings where the District Director is both prosecuting attorney and judge, be any constitutional exercise of due process. As to this Petitioner the applicability of Section 252 (b) is unconstitutional; all the earmarks of due process are lacking.

As Judge Moore in a dissenting opinion in *U. S. ex rel. Stellas* v. *Esperdy*, 366 F.2d 266, (C.A. 2, 1966), said:

> "Here is a case so violative of the fundamen-

tals of due process that in this day and age when courts seem greatly concerned with fair trial, the right to a hearing and meaningful appellant review, I simply cannot understand, much less agree with, the result reached by the majority. The facts tell a story reminiscent of the 'due process' of the Middle Ages, the Star Chamber — even of the shanghaiing of seamen. . . ."

II. The Government Ignores the Shift in Goal Posts

In the hearing before the District Director the statute then in force (8 U.S.C. 1253 (h)) dealt with "physical persecution," and the caption on the Immigration Service file of the Petitioner so indicates (viz. R. 101). The case before the Honorable William East, District Judge, also dealt only with "physical persecution":

> ". . . Evidence substantiating the petitioners'[1] claim of physical persecution for their political beliefs is conspicuous by its complete absence."

But the Government ignores the fact that the statute as amended October 3, 1965 has given a new right not existing at the time of the hearing in Case No. 65-10,—a right which could not have been adjudicated then. A new issue has arisen with the new goal posts, and no longer do the rules require "physical persecution."

This Petitioner is entitled to his hearing on the question of "persecution on account of race, religion, or political opinion."

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[1] Another seaman was also involved in that case.

III. The Actual Departure of the Ship Voids the Need for a Summary Deportation Procedure.

In dismissing Petitioner's authorities (Appellee's Brief, pp. 18-19) on the ground that the delay was gained by Petitioner's maneuvers, and that the Petitioner had actually been taken into custody before the ship had left, is the Government encouraging seamen to hide for the required period? Stanisic showed good faith and openly and promptly presented himself to the Immigration Office in Portland two days after he had made his decision to seek asylum. For his good faith should he be penalized and thereby be denied a full and fair hearing before a special inquiry officer? If the Government be correct, he would have gained such a right if he had used deception and flight. Surely this cannot be good law. Stanisic had made a legal entry.

The *Matter of M, 5 I. & N.* 127 (1953) is applicable here, as is also the rule in Gordon and Rosenfield (Br. 12).

IV. Bias and Prejudice

The Government contends that Petitioner's claim of persecution was rejected as being without foundation. Yet, let us look at what even Urbano's opinion of January 25, 1965 shows:

> ". . . he was told then that if he ever tried it [exit from Yugoslavia] again he would be sentenced to life imprisonment. (R. 103)
>
> "When Tito took over in 1945 the applicant's

father lost both of his jobs. Because he was anti-Communist he was not given the pension to which he was entitled. . . . The applicant stated his father's life was twice threatened by the Communists after the war, he was beaten and his home was ransacked. . . . (R. 103)

"The applicant stated that more than 30 of his uncles and cousins were killed by the Communists after the war, the last being in about 1950. . . . (R. 103)

"The applicant stated that 80 per cent of the Orthodox churches in Yugoslavia have been closed by the authorities, but that most of the Catholic churches are open. . . ." (R. 104)

Witnesses hurriedly rounded up by the Petitioner testified:

"[The witness] . . . was called before the secret police and questioned about remarks he had made in favor of the United States. He was admonished that he had better be careful or he might get into trouble. . . .

". . . the political prisoners there were tortured, beaten and killed. He personally saw only one prisoner beaten, but the stories about the other atrocities were given to him by other persons allegedly imprisoned for political reasons. . . .

"The witness stated that if the applicant [Stanisic] is sent to Yugoslavia he will be badly punished, and it would be better for him to die first. He stated he will suffer broken arms and ribs and other tortures. . . ." (R. 105)

Rade Dzankic, who escaped from Yugoslavia but was caught and imprisoned for three years, stated:

> ". . . that while in jail in Yugoslavia he suffered many tortures, such as being beaten, placed in solitary confinement, and being starved. He said the other political prisoners were treated the same way. . . .
>
> "It is the opinion of this witness that if the applicant is returned to Yugoslavia he will be tortured and will suffer punishment much more severe than that which would be inflicted on a Communist in the same circumstances. . . ." (R. 106-107)

In the face of all this Urbano naively concluded that:

> ". . . in many instances the authorities in Yugoslavia in recent years have been considerate and understanding in their dealings with their nationals, whether their beliefs be for or against the Communists. . . ." (R. 109-110)

In the meantime the Associated Press on September 24, 1966 (The Oregonian, September 24, 1966, p. 3) reported that a university lecturer has been sentenced to a year in prison in Yugoslavia for urging a multiparty system, with an added ban of silence as well as a fine. In yet another instance, the former Communist vice-president of Yugoslavia, Milovan Djilas, languishes in prison because of his exposure of the Communist bureaucracy in Yugoslavia.

The Immigration Service cannot in any way guarantee the safety of the Petitioner in the event he be

deported. It has no assurance from the Yugoslav Government or anyone else as to his fate, if he be returned to Yugoslavia.

Such an opinion by the District Director, sitting as both prosecuting attorney and judge at a hastily arranged summary hearing, clearly demonstrates bias and prejudice. For the Government to say (Br. 15) that the Petitioner was given the virtual equivalent of a hearing before an impartial special inquiry officer overlooks the fact that it was this District Director who judged. The coin rings false and does not fit our American standards of fairness and due process.

V. Postscript

As this brief goes to the printer, the news of the bombing of the Yugoslav embassies and consulates simultaneously in the United States and Canada heightens the probability that the Petitioner-Appellant with his anti-Communist background will be dealt with severely, if he is deported to Yugoslavia, not because of leaving the ship in Coos Bay but for his anti-government family ties and lack of belief in Communist ideology and guilt by association.

CONCLUSION

Therefore, the judgment below should be reversed, and the Petitioner should be granted a full and fair hearing before an impartial special inquiry officer according to normal deportation procedures.

In the alternative, and only if all other remedies are unavailing, he should be allowed a reasonable time to leave on a voluntary basis.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.